



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re:) Case No.: LA04-29146SB
Khaled M. Ahmed,) Chapter 13
Debtor.) **OPINION ON IRS MOTION TO RECONSIDER
ISSUANCE OF DISCHARGE**
Date: February 17, 2009
Time: 2:00 p.m.
Ctvm: 1575

I. Introduction

This case raises the issue of whether the court should reconsider and set aside an order granting debtor's discharge in this chapter 13¹ case entered after the debtor had completed payments under the plan, but while the order confirming the plan was on appeal. The court denies the motion because the IRS failed to obtain (or even request) a stay pending appeal of the confirmation order.

¹ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C.A. §§ 101-1532 (West 2009) and to the Federal Rules of Bankruptcy Procedure Rules 1001-9036.

The court denies the motion for the reasons stated herein.

II. Relevant Facts

Debtor Khaled M. Ahmed filed this bankruptcy case under chapter 13. The IRS opposed confirmation of the debtors plan on the grounds that Ahmed was ineligible to be a debtor under chapter 13, principally because of an alleged debt to the IRS totaling more than \$10 million. This court overruled the IRS objection and confirmed Ahmed's chapter 13. Ahmed thereafter completed his payments under the plan and received a discharge.

On appeal, the district court sustained the IRS appealed the confirmation order to the position which issued an order of reversal on the grounds that Ahmed was not eligible for

1 chapter 13 relief. Ahmed in turn appealed the
2 district court order to the Ninth Circuit, where it
remains pending.

3 After the district court reversed this
4 court's chapter 13 plan confirmation order,
5 Ahmed and the IRS stipulated to a stay of the
6 district court's reversal order pending the
7 appeal to the Ninth Circuit. This stipulation did
8 not purport to affect the underlying order
confirming Ahmed's chapter 13 plan.
Furthermore, the IRS has never sought a stay
pending appeal of this court's chapter 13 plan
confirmation order, either in this court or in the
district court, and there is no relevant
stipulation on this issue.

9 Because there was never a stay on
10 the plan confirmation order, Ahmed made the
11 payments required thereunder, which included
12 payment of more than \$400,000 to the IRS.
13 The IRS accepted all of these plan payments
without objection or reservation. Furthermore,
14 in an open court hearing on this motion, the
15 IRS specifically refused to return the plan
16 payments (or any portion thereof) to Ahmed.

17 After the completion of the plan
18 payments, the chapter 13 trustee filed a final
19 report and account and requested that Ahmed
20 receive a discharge of indebtedness. The final
21 report was served only on Ahmed and his
22 attorney Kathleen March. After no timely
objection to discharge was received, the court
issued a discharge order.

23 After the issuance of the discharge
24 order, and while this motion for
25 reconsideration was pending, the IRS filed an
26 objection to the chapter 13 trustee's final
27 report and to the granting of the discharge. In
28 response, the chapter 13 trustee filed a
"withdrawal" of her final report. However,
because no adversary proceeding was
initiated by either the trustee or the IRS to
revoke the discharge, it remains in place.

The IRS brought a timely motion to
reconsider the discharge order on the grounds
that it did not receive adequate notice and
thus had no opportunity to object to the final
report, and because the discharge order was
"entered by mistake."

Parties have provided the court with
three rounds of briefing and the court has
conducted three rounds of oral argument (two
of which were quite lengthy) on this motion.
This matter has been fully examined and
argued.

III. Discussion

The motion for reconsideration of the
entry of Ahmed's discharge is properly before
the court. The IRS timely filed its motion
under Rule 59(e) of the Federal Rules of Civil
Procedure, adopted by reference in Rule
9023, which permits a party to seek to alter or
amend a judgment within ten days of the entry
thereof. In addition, a full consideration of the
IRS' arguments in this motion avoids any
issue of insufficient notice to the IRS before
the discharge was entered.²

The court denies the motion to
reconsider on the grounds that, in the absence
of a stay pending appeal of the confirmation
order, this court had jurisdiction to proceed
with the chapter 13 plan. In consequence,
Ahmed is entitled to the discharge that follows
from his full performance of his obligations
under the plan.

A. Jurisdiction and Authority to Enter the Discharge Order

The IRS argues that the court lacked
jurisdiction to enter the discharge order and
that the discharge was entered in error
because the confirmation order was on
appeal. The court rejects the IRS's argument
for the following reasons: (1) the IRS never
obtained stay pending appeal of the
confirmation order, and thus, the court
retained jurisdiction over Ahmed's case
despite the district court's reversal order, (2)
the court had both the jurisdiction and the duty
to grant the discharge under § 1328(a).

² Section 1328(e) provides that a discharge
may be revoked only if it was obtained by
fraud. However, this section is inapplicable to
the motion before the court, which timely
challenges the issuance of the discharge in
the first instance. The court assumes that this
motion is brought under Rule 9023,
incorporating by reference F.R. Civ. P. 59,
which authorizes the reconsideration of a
judgment by motion filed within ten days of the
entry thereof.

1 **1. IRS Failure to Obtain Stay Pending**
2 **Appeal**

3 A stay pending appeal is provided by
4 Rule 8005, which states in relevant part:

5 A motion for a stay of the judgment,
6 order, or decree of a bankruptcy judge
7 . . . or for other relief pending appeal
8 must ordinarily be presented to the
9 bankruptcy judge in the first instance.
10 Notwithstanding Rule 7062 but
11 subject to the power of the district
12 court and the bankruptcy appellate
13 panel reserved hereinafter, the
14 bankruptcy judge may suspend or
15 order the continuation of other
16 proceedings in the case under the
17 Code or make any other appropriate
18 order during the pendency of an
19 appeal on such terms as will protect
20 the rights of all parties in interest.

21 At any time after filing the notice of
22 appeal (before or after the decision of the
23 district court), the IRS could have filed a
24 motion for a stay pending appeal. An appeal
25 may take an extended period of time, and an
26 appellate court decision may come too late for
27 the party seeking review. To alleviate this
28 problem, "as part of its traditional equipment
for the administration of justice, a federal court
can stay the enforcement of a judgment
pending the outcome of an appeal." *Nken v.*
Holder, 129 S.Ct. 1749, 1754 (U.S. 2009).
"A stay does not make time stand still, but
does hold a ruling in abeyance to allow an
appellate court the time necessary to review
it." *Id.* However, where the appealing party
does not even seek a stay, it cannot claim
benefits as if it had obtained a stay.

No bond for a stay pending appeal
would have been required. While a
supersedeas bond is usually required to obtain
a stay (and often impractically expensive in a
bankruptcy case), the U.S. government
(including the IRS in this case) is excused
from posting such a bond.³

³ Rule 8005 further provides in relevant part:

[W]hen an appeal is taken by the
United States or an officer or agency

The IRS, however, has made no
attempt to obtain a stay of this court's
confirmation order, either in this court or in the
district court.

a. Consequences of a Bankruptcy Appeal

It is important to understand the scope
and effect of an appeal from a bankruptcy
court order or judgment. This results from the
nature of a bankruptcy case and its difference
from ordinary civil litigation.

A bankruptcy case is far different from
an ordinary civil case. In an ordinary civil case
in a state court or a federal district court, the
complaint specifies a discrete subject of
litigation. The parties then conduct discovery,
after which the court conducts a trial and
issues a judgment. Alternatively, the case
may be settled at any point (as occurs in some
98% of all civil cases), or the court may render
a dispositive judgment (such as by summary
judgment or on a motion to dismiss). Except
where a case is settled, the losing party may
take an appeal of the final judgment. When
the appeal is taken, there is typically nothing
more for the lower court to do. It is the
general policy of the federal courts that
appeals may be taken only from final
judgments.⁴ See, e.g., 15A CHARLES ALAN
WRIGHT ET AL., FEDERAL PRACTICE AND
PROCEDURE 2D § 3907 (Supp. 2009) ("For two
centuries, the final judgment rule has been the
heart of appellate jurisdiction in the federal
system.").

Bankruptcy cases are different.
The filing of a bankruptcy case brings to the
bankruptcy court all of the legal problems of
the debtor. Virtually all pending litigation in
other courts is stayed, except where the
debtor is a plaintiff. See § 362. A plaintiff in
such litigation may file a claim in the
bankruptcy case (if there are assets to
distribute), as to which any party in interest
may bring an objection. Alternatively, any
party can bring non-bankruptcy litigation

thereof . . . a bond or other security
shall not be required.

⁴ Certain interlocutory appeals, none of which
are relevant herein, are authorized in federal
civil litigation. See 28 U.S.C. § 1992 (2006).

1 involving the debtor to the bankruptcy court by
2 removal from the state court or by reference
3 from the federal district court. Any dispute that
4 was not the subject of pending litigation in a
5 state or federal court at the time of bankruptcy
6 filing must be brought in the bankruptcy court.
7 A claim by the debtor is initiated by filing an
8 adversary proceeding against potentially
9 responsible parties. Other kinds of
10 proceedings in a bankruptcy case include
11 contested matters such as relief from stay,
12 approval to use cash collateral, sale of assets,
13 or assumption of unexpired leases.

14 Because of the number of issues and
15 proceedings that may be involved in a
16 bankruptcy case, an appeal of a bankruptcy
17 court order leaves some (perhaps most) of the
18 case behind in the bankruptcy court. Such an
19 appeal "will typically divest a [lower] court of
20 jurisdiction over those aspects of the cases
21 involved in the appeal." *Sherman v. SEC*
22 (*In re Sherman*), 491 F.3d 948, 967 (9th Cir.
23 2007) (internal quotations omitted) (citing
24 *Neary v. Padilla* (*In re Padilla*), 222 F.3d 1184,
25 1190 (9th Cir. 2000) and 10 COLLIER ON
26 BANKRUPTCY ¶ 8001.0 (15th ed. 2006)).
27 However, the bankruptcy court has full
28 jurisdiction to proceed on all other aspects of
the bankruptcy case.

17 b. Relevant Ninth Circuit Law

18 The Ninth Circuit case law specifies
19 the limited consequences of a bankruptcy
20 appeal and the scope of the jurisdiction that
21 remains in the lower court while an appeal is
22 pending. First, the lower court may not vacate
23 the order or judgment that is under appeal.
24 See *In re Combined Metals Reduction Co.*,
25 557 F.2d 179, 201-03 (9th Cir. 1979).
26 Second, the lower court "may not alter or
27 expand upon the [order or] judgment [that is
28 on appeal]." *Sherman*, 491 F.3d at 967 (citing
Padilla, 222 F.3d at 1190). However, a lower
court may file written findings of fact and
conclusions of law to aid the appellate court in
its review of the decision that is on appeal.
See, e.g., *Dressler v. Seeley Co.* (*In re*
Silberkraus), 336 F.3d 864, 869 (2003).]

26 The most important aspect of a
27 bankruptcy appeal is what issues the appeal
28 leaves behind for the lower court to resolve.
The lower court retains full jurisdiction over
any matter unrelated to the appeal. Rule 8005

provides: "the bankruptcy judge may . . . order
the continuation of other proceedings in the
case . . . or make any other appropriate order
during the pendency of an appeal"

In a bankruptcy case, the bankruptcy
court's remaining jurisdiction is typically quite
extensive, even where a reversal of the
bankruptcy court decision would eliminate all
bankruptcy court jurisdiction. See, e.g.,
Sherman, 491 F.3d 948 (where the order
appealed was the denial of a motion to
dismiss a chapter 7 case altogether).

In addition to its remaining jurisdiction
on matters unrelated to the appeal, a
bankruptcy court retains substantial
jurisdiction as to the order that is the subject of
the interlocutory appeal. The appeal only
deprives the bankruptcy court of the power to
alter, expand or vacate the order at issue.
Padilla, 222 F.3d at 1190. As the Ninth Circuit
stated in *Sherman*, "[t]he [lower] court retains
jurisdiction over all other matters that it must
undertake to implement or enforce the
judgment or order [that is on appeal]." 491
F.3d at 967.

Whether subsequent proceedings in a
lower court render an appeal moot is a matter
to be determined in the court where the appeal
is pending. Mootness is a complex issue,
especially in a bankruptcy case. In this case,
this court expresses no opinion on whether the
IRS's pending appeal of the order confirming
Ahmed's chapter 13 plan is moot.

3. Application in This Case

The outcome of this motion is dictated
by the Ninth Circuit's *Sherman* and *Padilla*
opinions. *Sherman* is directly on point. In that
case the Ninth Circuit upheld the bankruptcy
court's entry of a discharge order in a chapter
7 case, notwithstanding the SEC's pending
appeal of an order denying dismissal of the
case. The court held that the bankruptcy court
retained jurisdiction to enter the discharge
because the SEC did not obtain a stay
pending appeal, and absent such stay, "[t]he
bankruptcy court retain[ed] jurisdiction over all
other matters that it must undertake to
implement or enforce the judgment or order . .
. ." *Sherman*, 491 F.3d at 967.

1 Like the SEC in the *Sherman* case,
2 the IRS never obtained a stay pending appeal
3 in this case.⁵ Accordingly, like the bankruptcy
4 court in *Sherman*, this court retains jurisdiction
5 to implement and enforce the plan
6 confirmation order and to grant Ahmed a
7 discharge upon completion of his plan
8 payments.

9 The IRS' reliance on the Ninth
10 Circuit's earlier *Padilla* is misplaced. *Padilla* is
11 a very narrow case. The bankruptcy judge in
12 that case had dismissed the case altogether.
13 That dismissal order, and not the appeal
14 thereof, deprived the bankruptcy court of any
15 further jurisdiction in the case. After the
16 bankruptcy appellate panel reversed the
17 dismissal, it issued a mandate that restored
18 jurisdiction to the bankruptcy court. A month
19 after the issuance of the mandate, the trustee
20 filed a notice of further appeal with the Ninth
21 Circuit, which divested the bankruptcy court of
22 the jurisdiction resulting from the previously
23 issued mandate. Thus, the Ninth Circuit held,
24 "with the timely filing of *this appeal* [i.e., the
25 appeal of the BAP decision to the Ninth
26 Circuit] by the Trustee, the bankruptcy court
27 was divested of jurisdiction to proceed with
28 *Padilla's* bankruptcy." *Padilla*, 222 F.3d at
1189.

In addition, the narrow interpretation
that the Ninth Circuit gave to *Padilla* in the
Sherman case dictates that *Padilla* does not

⁵ The role of the stay is further underscored by
28 U.S.C. § 158(d)(2)(D). Under that statutory
provision,

[a]n appeal under this paragraph [to
the court of appeals] does not stay
any proceedings of the bankruptcy
court, the district court, or the
bankruptcy appellate panel from
which the appeal is taken, unless the
respective bankruptcy court, district
court, or bankruptcy appellate panel,
or the court of appeals in which the
appeal is pending, issues a stay of
such proceeding pending the appeal.

See *Sherman*, 941 F.3d at 967 n.23. Section
158(d)(2)(D), however, was not enacted until
2005 and, therefore, has no application in this
case.

apply to this case. In *Sherman*, the Ninth
Circuit distinguished *Padilla* on the grounds
that, in *Padilla*, (a) the bankruptcy court had
granted the dismissal motion, (b) the
bankruptcy appellate panel had reversed the
dismissal, and (c) thereafter the bankruptcy
court had granted the discharge. See
Sherman, 491 F.3d at 967 n.24. In *Sherman*,
in contrast, the bankruptcy court had denied
the motion to dismiss and the district court had
reversed. *Id.* Thus, in the Ninth Circuit's view,
the appeal of the order in *Sherman* was
interlocutory, and left the bankruptcy court with
jurisdiction to issue a discharge, while the
bankruptcy court order in *Padilla* granting
dismissal was a final order that divested the
bankruptcy court of jurisdiction to issue a
discharge. *Id.*

The present case is like the *Sherman*
case and unlike the *Padilla* case. Unlike
Padilla, this case does not involve a final
bankruptcy court order dismissing the case,
and thereby terminating this court's jurisdiction
until an appellate court's reversal of the
dismissal order and issuance of a mandate on
that decision. As in the *Sherman* case, this
court rejected the position of the IRS
(objecting to plan confirmation on the grounds
that Ahmed was ineligible for a chapter 13
case), which may have put an end to the case,
and issued an order (confirmation of the plan)
that continued the case on course.

Thus, as in *Sherman*, the IRS appeal
(which is now pending at the Ninth Circuit) is
interlocutory, and this court retains jurisdiction
to issue orders to implement the plan.
In addition, this court retains jurisdiction over
the case in all other relevant respects, except
to alter, expand or vacate the confirmation
order (because of its pending appeal).

Implementing the confirmation order
includes the enforcement of the debtor's
completion of the plan payments, and the
issuance of a discharge upon the completion
of the payments. Thus, pursuant to *Sherman*
and *Padilla*, this court has jurisdiction to issue
the discharge in this case.

3. Chapter 13 Trustee's Withdrawal of Final Report

The IRS puts heavy weight on the
chapter 13 trustee's withdrawal of her final
report, which she filed after the entry of the

1 discharge. The withdrawal of the report, the
2 IRS contends, revokes the certification that
3 Ahmed has met the requirements necessary
4 to receive his discharge. On these grounds,
5 the IRS argues, Ahmed's discharge must be
6 revoked.

7 Revoking a chapter 13 discharge is
8 not so easy. Section 1328(e) provides in
9 relevant part:

10 On request of a party in interest . . .
11 and after notice and a hearing, the
12 court may revoke such discharge only
13 if—

14 (1) such discharge was obtained by
15 the debtor through fraud; and

16 (2) the requesting party did not know
17 of such fraud until after such
18 discharge was granted.

19 In addition, Rule 7001(4) requires an
20 adversary proceeding to revoke a discharge.

21 Neither the IRS nor any other party in
22 interest has filed an adversary proceeding to
23 revoke Ahmed's discharge in this case.
24 The IRS has not taken the position that it was
25 unaware of any relevant conduct by Ahmed,
26 whether fraudulent or not, prior to the granting
27 of the discharge. Neither the IRS nor any
28 other party in interest has offered any
evidence that Ahmed obtained his discharge
through fraud.

Withdrawal of the trustee's final report
alone does not suffice to revoke Ahmed's
discharge. Thus the discharge remains
in place.

20 B. The Court's Duty to Enter a Discharge

21 Ahmed argues that the court had both
22 the power and the duty under § 1328(a) to
23 enter Ahmed's discharge. Ahmed's position is
24 well taken. Section 1328(a) provides in
25 relevant part:

26 [A]s soon as practicable after
27 completion by the debtor of all
28 payments under the plan . . . the court
shall grant the debtor a discharge of
all debts provided for by the plan . . .
(emphasis added).

Pursuant to this statutory provision, the court
is required to grant a chapter 13 discharge

to a debtor as soon as practicable after
all requirements of §1328 are met. See, e.g.,
In re Goodwin, 58 B.R. 75, 78 (Bankr. D. Me.
1986).

C. Estoppel

Finally, as an independent ground for
denial of the IRS motion to reconsider, the
Ahmed argues that the IRS is estopped from
denying the propriety of the entry of the order
of discharge under the principle of quasi
estoppel. In opposition, the IRS argues that
estoppel does not apply to the government.
Given the court's resolution above, it does not
reach this issue.

IV. Conclusion

The court concludes that it has
continuing jurisdiction, notwithstanding the
pending IRS appeal of the decision confirming
the debtor's chapter 13 plan (which reversed
the confirmation order but which is stayed
pending further appeal), to grant a discharge
to the debtor following the completion of his
plan payments. The court finds, in
consequence, that Ahmed's discharge was
properly granted in this case.

The chapter 13 trustee's subsequent
withdrawal of her final report does not affect
this conclusion. A chapter 13 discharge can
only be set aside pursuant to an adversary
proceeding, and only on the grounds of fraud
of the debtor that was unknown to the
requesting party until after the discharge is
granted. No adversary proceeding has been
filed to set aside Ahmed's discharge, and it
appears that the IRS would be unable to show
that it was unaware of Ahmed's conduct,
whether fraudulent or not.

Accordingly, the IRS's motion to
reconsider the issuance of the chapter 13
discharge is denied.

Dated: August 28, 2009


Hon. Samuel L. Bufford
United States Bankruptcy Judge

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- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. **DO NOT** list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **OPINION ON IRS MOTION TO RECONSIDER ISSUANCE OF DISCHARGE** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") B Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of August 28, 2009, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Kathleen P. March, Esq.	kmarch@bkylawfirm.com
Elaine T. Fuller, Esq.	elaine.t.fuller@irsounsel.treas.gov
Nancy K. Curry, Trustee	ecfnc@trustee13.com
United States Trustee	ustpregion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Khaled M. Ahmed
Post Office Box 667
Huntington Park, California 90255

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III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

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